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OBSERVATIONS ON THE OBSERVANCE OF ADMINISTRATIVE LAW IN UNIVERSITY STUDENT DISCIPLINARY PROCEEDINGS: A SURVEY OF SELECTED UNIVERSITIES IN SOUTHERN AFRICA

Charles Goredema

Lecturer, Department of Public Law, University of the Western Cape

INTRODUCTION

The case for the transformation of educational institutions, particularly the universities, in South Africa has been well pleaded. Many universities have set up transformation structures of one form or another to give direction and pace to the efforts to create a non-racial education system. The administration of student discipline on university campuses must be examined in the context of that transformation. In South Africa, it should also be viewed in the light of the recent fundamental Constitutional developments which seek to close the door to authoritarianism and usher in an era of self-sustaining legitimacy. While those developments are taking place indiscipline and misconduct at university campuses occasionally shift the focus from the primary task at hand.¹ Ironically, some of the violations of disciplinary rules at university campuses have been explained away as radical efforts to either jump start, or accelerate, transformation. It is imperative, even in the face of such rationalisation, for universities to inculcate in their students an appreciation of the values that underpin the society which the new South African social order strives for. It appears that they can do this if university authorities uphold these values in their interaction with students. This survey examines the practice at some of the residential universities in South Africa, Lesotho and Zimbabwe, with a view to determining the extent to which these practices are consistent with the dictates of administrative law as it obtains in each country.

A THEORETICAL PERSPECTIVE

The relationship between a university student and the university appears at first sight to be entirely contractual. It may appear that the student's position is analogous to that of a party to a contract which makes certain demands on him and offers him reciprocal benefits. On enrolling the student, the university undertakes to provide tutorship, facilities and a learning environment that is conducive to the pursuit of knowledge. The student in turn undertakes to pay the fees which will make it possible for the university to provide these services. He also undertakes to commit himself to the process of learning.² The relationship does, however, have a disciplinary dimension to it. In so far as the university commits itself to creating and maintaining an environment that is conducive to learning, it assumes a position of authority in relation to the student. In turn the student undertakes to accept that authoritative status.

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- 1 Violations of disciplinary rules ranging from vandalism to aggravated assault have occurred at many universities in South Africa. Media attention has, at one point or another, been drawn to unsavoury events at the universities of Pretoria, Witwatersrand, Vista, South Africa, Free State, Fort Hare, Rhodes, Durban Westville, Cape Town, and the Western Cape.
 - 2 Indeed, in *Sibanyoni and Others v University of Fort Hare* 1985 (1) SA 12 (Ck), Pickard ACJ, based his judgement on this theory. He went on to hold, erroneously, that the rules of natural justice had no application to matters of contract.

A relationship of authority is by definition hierarchical.³ It is a relationship in which the student is in a subordinate position and the university is in a superior, superordinate, position. The relationship is also administrative. An administrative relationship is characterized by the unequal distribution of power between the subordinate and the superordinate. The attribute by which the latter is easily identifiable is the vesting of power in it, power which it is in a position to enforce.⁴ The power is usually derived from statute, and normally the same statute will define the subsidiary position of the subordinate. A common formula is to provide that every registered student shall be subject to the disciplinary authority of the university council.

As an administrative relationship, the student/university relationship is regulated by administrative law. Apart from creating and recognizing certain rights, administrative law also serves to prevent the wrongful encroachment upon or violation of those rights.⁵ This essay attempts to examine the extent to which the principles of administrative law are observed in university student disciplinary processes at selected universities in southern Africa.

THE NATURE OF DISCIPLINARY PROCEEDINGS

The disciplinary power of a university is quite often derived from the Act by which the university was established, or the statute from which it derives its authority. It is common for the "primary" statute to empower the university Council or some other body to make disciplinary rules. Thus, the University of Venda Act provides, in section 20, that:

A student of the University shall be subject to the disciplinary provisions prescribed by the Statute or by the rules made by the Council.

In terms of that enabling provision, regulations are then made, dealing with, *inter alia*, control of students and disciplinary action. Disciplinary regulations create the framework within which disciplinary action is taken. They set out the procedure to be adopted in respect of inquiries into alleged indiscipline. These regulations provide a useful reference point in this discussion. This essay seeks answers to a number of questions relating to the nature of the proceedings: whether the rules of natural justice are observed; whether there is a right to representation; what standard of proof is applied; and whether a comprehensive record of the proceedings is kept.

There are three broad categories into which administrative proceedings of a judicial or quasi-judicial nature can be divided.⁶ They may be accusatorial and resemble a criminal trial in which due process principles are prominent. In its purest form this model presupposes a contest between parties on opposite sides of a dispute. The accuser is responsible for proving the case to the satisfaction of an independent umpire who adopts an indifferent attitude to the objective truth underlying the contest. Proof is generally beyond reasonable doubt; and in striving to achieve such proof, the accuser can expect no co-operation or assistance from the accused. The inquisitorial model, in contradistinction, demands an interventionist role for the decision maker. The decision maker has the

3 See Steytler, "Policing Unrest": The Restoring of Authority, 1989 *Acta Juridica* 234.

4 Hosten *et al*, *Introduction to South African Law and Legal Theory*, (1995) 1046.

5 See also Hosten, *ibid.*, 1047.

6 See, generally Snyman "The Accusatorial and Inquisitorial Approaches to Criminal Procedure: Some Points of Comparison between South African and Continental Systems" (1975) 8 *CILSA* 100 and Herrmann "Various Models of Criminal Proceedings" (1978) 2 *SACC* 3-19.

responsibility of inquiring into the truth of the allegations made against the accused. For that purpose, he or she has power to question both the accused and the accuser, and to call witnesses if their evidence appears to be helpful in getting to the bottom of the case. Proof may be on a balance of the probabilities. Finally, there is a hybrid model which borrows from both the accusatorial and the inquisitorial. The extent of borrowing determines the side to which the resulting hybrid leans. Thus, the South African criminal trial is a predominantly accusatorial one, but it has significant inquisitorial aspects.⁷ That of France is predominantly inquisitorial, but it has some adversarial elements. These models are descriptive labels which are not used in the legislation which creates the procedural systems in question. Similarly, none on the university disciplinary regulations characterize the proceedings which they spawn one way or the other. One therefore has to examine the text of the regulations in order to make any such determination.

There would appear to be a relationship between the character of a disciplinary system and its capacity to observe the principles of administrative law, in particular the rules of natural justice. If the person who chairs a disciplinary committee actively participates in the presentation of the evidence against a student, it will be difficult for him or her to remain objective in the evaluation of that evidence. It will be even more difficult to deflect the perception of bias. The *nemo iudex in sua causa* rule may well be flouted. This is less likely to occur where there is a separation between the organ which investigates and presents the allegation and the adjudicative tribunal.

A feature that is common to most of the universities examined is that the disciplinary tribunal which deals with student discipline is not a mere investigatory body exercising powers of recommendation. It is an adjudicative organ in whom the power to make findings as to guilt or liability is vested. This is so notwithstanding the nominal description of the disciplinary process as an "inquiry",⁸ or an "investigation".⁹ In most cases, the disciplinary tribunal has sentencing powers as well. It is, to that extent, a final court. As such, the tribunal is therefore bound to observe and uphold the rules of natural justice.¹⁰

It is more difficult to determine whether the proceedings in each case are adversarial, inquisitorial or a bit of both. Two fairly broad approaches are manifest.

An inquisitorial approach is discernible in the Venda regulations. The chairperson of the disciplinary committee is responsible for calling witnesses to substantiate the allegations, as well as the production of any documentary evidence relevant to the hearing. Such witnesses are questioned by the committee and by the student who is facing a charge.

It appears that the parties to the disciplinary hearing are the student on the one hand and the disciplinary committee chairperson on the other. The university is not represented by a proctor or prosecutor. Thus, if the authenticity of evidence (e.g. a document) tendered at the hearing is contested by the accused student, the chairperson's dual role is exposed. As the person responsible for presenting the case against the accused, it is up to the chairperson to establish that the evidence is authentic. At the same time, he/she must participate in deciding the issue. In certain cases, this may create the impression of partiality.

7 For example, the guilty plea procedure in terms of section 112(1)(b), and the plea explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977.

8 See the University of the Western Cape's rules for the Student Discipline Court.

9 University of Zimbabwe Rules of Procedure in Disciplinary Proceedings before the Student Disciplinary Committee, Ordinance 30, Rule 8.

10 See *Vice Chancellor, University of Zimbabwe & Others v Mutasa & Others* 1993 (1) ZLR 162 (S).

In contrast, there are universities at which the functions of case presentation and adjudication have been separated. Provision is made for the appointment of a standing, or *ad hoc* university representative to present the case. At the University of Cape Town, a prosecutor, who is appointed by the Vice-Chancellor prepares and presents the case to the disciplinary committee. It is the function of the prosecutor to submit any evidence, documentary or oral, to support the allegation. If the authenticity of documentation is placed in issue, the prosecutor must prove it. The same system is followed at the University of the Western Cape, as well as the University of Zimbabwe. At the latter, the prosecution is carried out by the Legal Proctor, who is a specially appointed academic from the Law Faculty. Similarly, the university appoints a prosecutor at the University of Natal (Durban) from the ranks of legal academics. The National University of Lesotho also deploys one of its legal academics as a prosecutor. The prosecutor need not be a member of staff at Wits University.¹¹ At Rhodes University the case against a student is investigated and presented by the Investigating Officer, who is "a member of the academic staff who has served as judicial officer or practised as an officer of a superior court of law".

The University of the North West has a different system. The disciplinary committee there does not have adjudicative powers. It only performs an investigatory role. The committee is composed of 12 persons who represent the various components of the university. An allegation of misconduct is investigated by the security department and a report is submitted to the committee. The Chairperson of the committee performs a similar function to his Venda counterpart. At the end of the hearing, the committee should make a recommendation to the Deputy Vice-Chancellor responsible for Student Affairs.

Notwithstanding that distinction in resolute power between the North West's committee and its counterparts elsewhere, the former is also enjoined to observe the rules of natural justice.¹²

THE RIGHT TO BE HEARD AND TO BE REPRESENTED

The right which is expressed in the maxim *audi alteram partem* is a basic natural justice right. It is the right to be given an opportunity to be heard by or to make representations to an administrative tribunal. Friedman J (as he was then) reiterated the point thus:

The celebrated principles of natural justice provide that persons who are likely to be affected by administrative action should be entitled and afforded a fair and impartial hearing before a decision to act is taken.¹³

In judicial proceedings, a corollary of that right is the right to legal representation. The issue of whether a person who is facing an allegation in an administrative hearing is entitled to be represented by a lawyer or by some other person is problematic. The extension of the principles of natural justice to proceedings in university disciplinary tribunals is mainly justified by reference to the punitive or damning character of the decisions that may be

11 In terms of the Rules for Student Discipline at Wits, the Vice-Chancellor may appoint a member of the staff of the university, an attorney or counsel or both to present the case against the student. For some reason which is not readily apparent, this official is referred to throughout as "the person presenting the case against the student."

12 At common law, the requirement of procedural fairness permeates all administrative actions. See *Administrator Transvaal v Traub* 1989 (4) SA 731 (A). The interim Constitution has elevated this to a fundamental right, through section 24 (b).

13 In *Yates v University of Bophuthatswana & Others* 1994 (3) SA 815, at 835 C-D.

taken on account of such proceedings.¹⁴ The right to be heard is obviously one of the rights which apply. Does it necessarily follow that the right to legal representation must be observed? In *Yates v University of Bophuthatswana & others*¹⁵ the court inferred, from certain provisions relating to the rights of the subject of the inquiry, that the right applied. The contract of appointment, in that case, gave the applicant the right:

- (a) to be informed in writing of the nature of the inquiry in such a way as to enable him to prepare his defence, and, furthermore, . . . at least 20 working days notice thereof;
- (b) to call witnesses and lead relevant evidence, and to cross-examine the witnesses against him.

The court indicated that it would have upheld the right to legal representation even in the absence of such a contractual provision. Among the principles which he regarded as relevant to "hearings before statutory, quasi-judicial and disciplinary bodies", Judge Friedman included the following:

that a person appearing before a statutory or quasi-judicial or disciplinary tribunal be accorded every opportunity of putting his/her case clearly and concisely. Inherent in this principle is that the said person is entitled to engage someone trained in the law to put his/her case to the tribunal concerned, in that the person trained in the law is better able to put the case than the person involved. This is the basis of legal representation.¹⁶

He also described it as the "most persuasive"¹⁷ (sic) right available to a person accused of wrongdoing before a tribunal. The learned judge did not allude to the position at common law. If he had, he would have noted that under both South African and English law, legal representation is not a *sine qua non* of a fair oral hearing.¹⁸ As Baxter points out, while "(there) are advantages to be gained by legal representation in certain proceedings, . . . there is also much to be said for keeping lawyers out of the administrative process where the adjudicative process is not essential: lawyers and over-judicialization tend to go hand in hand".¹⁹ It is only where the case is unusually complex that legal representation might be implied as a requirement to a fair hearing. In other words, the right to be heard does not necessarily imply the right to be heard through a lawyer. Indeed, some statutes expressly exclude legal representation.²⁰

The courts will, however, be reluctant to read an exclusion of legal representation into a statute which is silent on the point.²¹ The general approach of the courts in such cases is that where an individual's career is at stake before a tribunal, he should be entitled to be legally represented if he so wishes.²²

14 *Lunt v University of Cape Town & Another* 1989 (2) SA 438© at 446 J.

15 *Supra*, note 6.

16 At page 846 G-H.

17 At page 846 I. It appears that the learned judge meant to say most pervasive.

18 *Dabner v South African Railways & Harbours* 1920 AD 583.

19 Baxter, *Administrative Law* (1984) 555-6.

20 For instance, no legal representation is allowed in the Small Claims court, in terms of the Small Claims Court Act 61 of 1984.

21 See McNally JA's judgment in *Vice-Chancellor, University of Zimbabwe & Others v Mutasa & Others*, *supra* at 174.

22 See *Metsola v Chairman, PSC & Another* 1989 (3) ZLR 147 (S); *Chairman, PSC & another v Marumahoko* 1992 (1) ZLR 304.

Interfering with the right

The Venda regulations specifically exclude legal representation.²³ This is in spite of the fact that the cases which fall within the jurisdiction of the disciplinary committee are those which are serious enough that they cannot be disposed of by the disciplinary committee of the SRC²⁴ or by the House Representative Committee.²⁵ It is a trite principle that the common law can be superseded by statute. The Venda regulations can therefore legitimately negate legal representation if it flows from the common law. The question is whether the position is still entirely regulated by the common law.

Section 24 of the interim Constitution of South Africa²⁶ created a statutory framework for administrative justice. In subsection (b), it enshrined a right to procedurally fair administrative action. This subsection encompasses the requirement to observe the *audi alteram partem* rule. If that rule is widely conceived to imply the right to legal representation, as Judge Friedman declared, the right must be regarded as having been constitutionalized.

Wiechers²⁷ and Corder²⁸ share the view that the right to a hearing includes the right to be assisted by legal counsel. Wiechers regards it as being conditional upon the circumstances of the administrative enquiry. Corder, on the other hand, suggests that it should be an open right exercisable at the option of the individual subject of the administrative action. In my view, in disciplinary proceedings, the right to a hearing incorporates the right of legal representation, even where the hearing does not have the potential to yield results which are disastrous to a person's rights or interests. This is the only way through which effect can be given to the intention of building into the Constitution the rules of natural justice. It should be left to the subject of the disciplinary process to decide whether the services of a lawyer are necessary.²⁹ If the right to legal representation is implicit in section 24(b) of the Constitution,³⁰ a law which negates that right is *prima facie* unconstitutional. As such, it can only survive if it is reasonable, justifiable and in an open and democratic society based on freedom and equality.³¹

It is arguable that in certain circumstances, the prohibition of legal representation is a reasonable and justifiable limitation. It acknowledges and serves to maintain the "lay" balance between the university and the person charged with an offence. This thinking appears to be implicit in the rules at some institutions at which the disciplinary committee

23 Regulation (d)(v) reads: "No legal representation shall be allowed at the hearing of a student on a charge of misconduct, but a minor may be assisted at his/her hearing by a parent or guardian."

24 Created in terms of Regulation (f).

25 Created in terms of the Residence Regulations, regulation 2(a) and given responsibility for "discipline in the residences" subject to the control of the Dean of Students.

26 At the time of writing, the interim Constitution of 1994 was in force in South Africa. It has since been replaced by the final Constitution, whose provisions on administrative justice are broadly similar.

27 Administratiefreg (1984) 211.

28 Corder, "The Content of the Audi Alteram Partem Rule in South African Administrative Law" (1980) 43 THRHR 156, at 177.

29 As Corder argues, the cost of legal representation coupled with the rarity of occasions when such representation is really necessary, will militate against its excessive use.

30 In the Final Constitution, section 24(b) is reproduced as section 32(1) which reads: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." Subsection (3) imposes a duty on the State to pass legislation to give effect to those rights.

31 i.e. it must comply with the requirements of section 36(1) of the Constitution.

regularly operates without a prosecutor.³² The universities of Pretoria and Venda are two examples. The argument overlooks the patent imbalance inherent in the hierarchical nature of the relationship between the student and the university.

What is needed is to make a value judgement of the kind envisaged by the limitations clause in the interim Constitution and draw a line between minor cases and serious ones. The penalty which may be imposed in a particular case is a reliable distinguishing criterion. It should not be too difficult to differentiate between a transgression which will attract a warning at one end of the spectrum and one which might result in an expulsion at the other. It is submitted that while it might be reasonable to prevent the over-judicialization of the less serious cases by ruling out legal representation, the same cannot be said in respect of a hearing which may lead to the suspension or expulsion of a student. It would then be possible for rules to retain the exclusion of counsel, but only in restricted kinds of cases, determinable by reference to the effects on the rights of the student. In any event, in the more serious cases, even if a student is not represented, it would be preferable if a functionary who is detached from the adjudicating tribunal were to present the case. This in turn facilitates the observance of the other rule of natural justice, i.e. that the adjudicating authority should be free of bias. At the University of Cape Town relatively minor cases are heard by a Proctor's court, with no assessors. No legal representation is allowed then, but the sentence may not be expulsion, rustication from the university or residence or a fine of more than R500.³³

Some universities allow the accused student(s) to be represented, but then restrict the field from which the student may pick his representative, by stipulating that only a member of staff or a fellow student may represent the student. One of these universities is Lesotho, at which institution the field was narrowed down because of what were perceived to be delaying tactics used by lawyers from "outside". On the face of it, there would appear to be nothing wrong with this kind of limitation of the right to representation. It is, however, conceivable, in a university setting, that it may lead to the negation of the right. This could arise on account of members of the university community being caught in a conflict of interest.

Adequate notice

The right to be heard encompasses a right to be given adequate notice of an impending inquiry/trial. There is no prescribed minimum notice or preparation time, but the student must be given a reasonable opportunity to prepare for the hearing. One observes that different universities set different notice periods, ranging from Rhodes's "at least 24 hours" to Wits' "not less than ten days" written notice. The shorter notice appears to be rather permissive of injustice in serious cases, especially where it is compounded by the denial of legal representation.³⁴

32 The clearest evidence of this is in the Student Discipline Rules of the University of Pretoria. In terms of Rule 2.6 an accused student is generally not entitled to be legally represented. If, however, the Registrar or the Disciplinary Committee appoint a prosecutor (described in the rules as "a capable person") to handle the charge on behalf of the university, the accused student is entitled to representation (See Rule 2.7). In contrast, the University of the North West, whose committee operates without a prosecutor, allows legal representation for students.

33 See University of Cape Town, DJP 5.1 to 5.9.

34 As is the case at Venda. The period of notice at Lesotho is seven days.

"Cards on the table"

Recent constitutional developments in South Africa have added to the content of the right to be heard. The party to be heard must have an opportunity to adequately prepare to be heard. He or she must have access to information which is relevant to his or her rights. In disciplinary matters, the information may be in the form of statements made by witnesses or documentary evidence. Section 23 of the interim Constitution created a right of access to "all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise or protection of his or her rights." This provision has been relied on to justify the disclosure of statements made to the police by witnesses before a criminal trial. It has been held that this right to disclosure is essential to the right of an accused person to challenge the evidence with which he will be confronted in the trial.³⁵ In civil cases, section 23 serves to incorporate a constitutional right to discovery.³⁶ It is arguable that section 23 extends to disciplinary proceedings in a university forum. It was held in *Baloro and others v University of Bophuthatswana and others*³⁷ that a university is an organ of state, and as such, it is bound by the Bill of Rights. If it has information which falls within the scope of section 23, it is obliged to disclose the information.

Moreover, the successor to section 23 is wider in scope. Section 32(1) of the final Constitution gives everyone the right of access not just to official information, but also to information which is in the custody of a person other than the state. Since that person may be a natural or juristic person,³⁸ it is submitted that the university would, as a juristic person, be included. Most of the universities whose rules were reviewed do not provide for pre-hearing disclosure.³⁹ It was, however, observed that the University of the Western Cape makes such disclosure as a matter of course in contested hearings. At the National University of Lesotho, the Dean of Student Affairs, who acts as the Registrar of the Disciplinary Committee, is obliged to serve an accused student with all witnesses' statements before the case is set down for a hearing. After such service, the student is then required to respond to the case against him/her.

THE ABSENCE OF BIAS

Natural justice requires of administrative authorities that they should be of unquestionable impartiality. This requirement, in its application to judicial and quasi-judicial organs, cannot be better expressed than it was by Solomon J, in *Liebenberg v Brakpan Liquor Licensing Board*⁴⁰ thus:

Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others, is disqualified

35 *S v Nassar* 1995 (1) SACR 212 (Nm); *S v Shabalala* 1995 (2) SACR 761 (CC).

36 *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E); *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W).

37 1995 (4) SA 197 (Bop).

38 Section 8(2) of the final Constitution extends the application of the Bill of Rights to all natural and juristic persons, where applicable.

39 Save for an obscure provision in the Wits rules, entitling the student to a copy of any written statement received in evidence and to inspect any other documentary or real evidence so received. See Rule 7(11). This rule appears to be intended to apply at the hearing rather than before, as the entitlement is conditional upon the reception/admission of the evidence.

40 1944 WLD 52.

if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial . . . The impartiality after which the courts strain may often in practice be unrealised without detection, but the ideal cannot be abandoned without irreparable injury to the standards hitherto applied in the administration of justice.⁴¹

This dictum expresses an important procedural value, which has certain implications for administrators and those affected by their determinations. This value has come to assume greater significance in modern society, because of the prevalence of the concentration of responsibilities or power in relatively few individuals. It is not unusual for one person to wear several hats! In universities, quite often disciplinary structures are presided over by officials who are part of and have other responsibilities within the university system. Two possibilities can be distilled from Solomon J's statement; first, actual bias and second, the appearance of bias. Actual bias is rather difficult to prove, more so where it is harboured subconsciously. The law does not insist on the proof of actual bias. In either case, the test for bias is the "reasonable suspicion" test, which is preoccupied with the perception of the fictitious reasonable lay observer. The question is whether the reasonable lay observer would gain the impression that there is a real likelihood that the decision maker will be biased.⁴² The decision maker does not have to be actually biased for that impression to be created. Among the circumstances which have been found to create the appearance of bias are the existence of a pecuniary interest and the existence of a personal relationship with one of the parties affected by the decision. Such a relationship need not be familial,⁴³ it may be social, business or professional⁴⁴ or even institutional.⁴⁵ Prejudice, which is often actuated or manifested by the prejudgement of the issues to be decided by the decision maker, clearly grounds disqualification for bias. In the words of Baxter, "(the) most obvious form of prejudice is that which arises when someone is both prosecutor and judge in the same case."⁴⁶

The prejudice should relate to the matter at hand in a way which could prevent a fair decision. In the context of a university disciplinary committee, a lecturer who initiated the complaint against a student would not qualify for membership of the committee trying that student. That would not, however, necessarily disqualify his colleague from the same department, or faculty.

The practice of arrogating to the chairperson of an adjudicative disciplinary committee the responsibility of submitting evidence and calling witnesses appears to raise the suspicion

41 At 54-5. Cited in Baxter, *supra* at 557.

42 *Metropolitan Properties (FCG) Ltd v Lannon* [1969] 1 QB 577, 599; *S v Radebe* 1973 (1) SA 796 (A), 811; *S v Herbst* 1980 (3) SA 1026 (E), 1030 and *Ciki v Commissioner of Correctional Services* 1992 (2) SA 269 (E), 271-2.

43 As was the case in *Liebenberg v Brakpan Liquor Licensing Board*, *supra*.

44 In *S v Nhantsi* 1994 (1) SACR 26 (Tk) the accused asked the trial magistrate to recuse himself on this ground. The facts showed that during an adjournment, while the main prosecution witness was still under cross-examination, the magistrate had travelled in the same motor car as the complainant. On another occasion, the magistrate had had a discussion with the complainant (who was a regional magistrate) and another magistrate in a closed office. The application for recusal having been refused, it was held, on review, that these facts gave rise to a reasonable suspicion that the magistrate may have been biased and he ought to have recused himself. It was accordingly ordered that the trial should start afresh before a different magistrate.

45 As was the case in *Ciki v Commissioner of Correctional Services and Another*; *Jansen v Commissioner of Correctional Services and Another* 1992 (2) SA 269 (E).

46 564.

of bias. As has been observed above, a dispute relating to the validity of the evidence might pit the presenter of the evidence against the student. This practice must surely yield the risk of prejudgement of the case by the chairperson. That risk looms larger if he or she is allowed or required to preview the evidence before the hearing. In the process, he or she might be prematurely persuaded by the first version presented to him/her. This could lead the chairperson to try and confirm a preliminary view through partisan cross-examination of the student. The result is to inculcate a bias in the chairperson.

It is therefore submitted that requiring the chairperson to present the evidence as well as judge the case is contrary to the dictates of natural justice. It goes without saying that it is also procedurally unfair. In South Africa, it conflicts with section 24(b) of the interim Constitution.⁴⁷

THE REQUIREMENT TO RATIONALISE DECISIONS

Whatever the position was at common law, in South Africa the Constitution now makes it obligatory for reasons for judicial and quasi-judicial administrative action to be given.⁴⁸ Section 24 of the interim Constitution required reasons to be given in writing to a person whose rights or interests are affected, unless the reasons have been publicized already. Section 33(2) of the final Constitution is in similar vein. This implies that administrative action must be rational and fair. The rationality of such action can, however, only be tested if the information on the basis of which the action was taken is also preserved. Two consequences flow from this; the first is that it is not sufficient to simply hand down an unsubstantiated decision, whether orally or in writing. Secondly, methods by which an accurate and accessible record of the evidence presented is compiled have to be used. It is not sufficient to simply take paraphrased minutes of the proceedings, because that creates room for inaccuracies and "editing".

There are variations in approach at respective universities. Some universities have enacted the obligation to keep a record by providing that the disciplinary courts shall be courts of record. The University of the Western Cape has adopted this approach. A variation of it is the formulation used in the University of Cape Town's rules, to the effect that "a record of proceedings in each case shall be kept in such manner as directed by the University Proctor." This seems to be more subjective than the first, in that it makes it unnecessary to keep a verbatim record.⁴⁹ The University of Zimbabwe's rules specifically permit such non-verbatim recording of the proceedings.⁵⁰ The University of Natal (Durban) keeps a verbatim record through its Student Affairs department.

Other rules are silent on the extent to which the proceedings must be recorded. The Venda regulations merely require the Registrar to appoint a member of the administrative staff to act as secretary to the disciplinary hearing, presumably to take minutes. The Transkei rules envisage the preparation of a report by the disciplinary committee for submission by the Registrar to Council in the event of an appeal. There are no guidelines as to the matters that must be covered by this report, or whether the evidence must be part of the report.

47 Section 32 (1) of the final Constitution.

48 In this regard, Baxter submits that the courts have not read the duty to justify a decision to the affected party(ies) into the rules of natural justice.

49 In practice, the University of Cape Town records the proceedings on tape. A transcript may be prepared in the event of an appeal or review.

50 See Rule 8.8.

Neither is there an indication of when this report must be prepared or whether it must be prepared as a matter of course. In view of the inquisitorial nature of the hearing, there is a danger that an irregularity committed during the hearing will be masked by a unilateral report which is compiled days or weeks after the hearing on the basis of selective notes. The potential for injustice to go undetected therefore looms large.⁵¹

STANDARD OF PROOF

Disciplinary proceedings often call for a choice to be made between conflicting versions of a given incident or event. Decision makers have to make the choice rationally. The casting of lots or thumb sucking are not permissible.⁵² This means that there has to be some indication of the extent to which the decision maker has to be persuaded before he or she can decide in favour of one version. In procedural law this extent of persuasion is referred to as the standard of proof. Generally speaking, in criminal cases proof has to be beyond reasonable doubt, while in other cases if the probabilities in one direction outweigh the probabilities pointing in the opposite direction the former will prevail.

Disciplinary proceedings are not criminal proceedings, regardless of the nature of the allegation. Principle would therefore dictate that the applicable standard should be the non-criminal one. There is, however, a difference of approach between South African and Zimbabwean administrative law on this important question. In South Africa the standard applied is "the balance of probabilities" standard.⁵³ In Zimbabwe the Supreme Court prefers a variable standard, depending on the nature of the allegation before the tribunal. The law was set out in the context of alleged embezzlement by a law firm in these terms:

Where an allegation involves professional misconduct simpliciter it only has to be proved on a balance of probabilities, but where an allegation involves an element of deceit or moral turpitude of a high order, which might make the accused liable to criminal prosecution, that allegation should be proved beyond reasonable doubt . . . The application of the two standards is reflective of the seriousness with which one is viewed over the other.⁵⁴

The recognition of such a dichotomy in standards advocated in that proposition has provoked critical comment, but the scope of this essay does not allow for a review of the pitfalls inherent in that approach.⁵⁵

The University of Cape Town rules insist on proof on a balance of probabilities. The University of the Western Cape is less specific. Its rules allow the disciplinary court to "convict the student if it is satisfied that, in the light of the evidence advanced or the

51 The only reference to a record of the proceedings at Rhodes occurs in Rule 18.9, which requires the Proctor to record the charge(s), the facts found proved, the verdict, punishment and the reasons for it within 48 hours of its imposition. Such a record cannot be complete.

52 Notwithstanding provisions to the effect that the decisions of the disciplinary committee shall be determined by a majority vote of the members present and every member shall cast his vote.

53 See *Olivier v Kaapse Balieraad* 1972 (3) SA 485 (A); *Law Society of the Cape v Koch* 1985 (4) SA 379 (C); Lewis, *Legal Ethics* (1982) p 310; Hoffmann and Zeffertt, *The South African Law of Evidence*, (4th ed)(1988) p 528.

54 Per Korsah JA in *Mugabe and Another v Law Society of Zimbabwe* 1994 (2) ZLR 356. See also *Pitluk v Law Society of Rhodesia* 1975 (2) SA 21 (R,AD), at 29 and *Chirambasukwa v Law Society of Zimbabwe* SC 135/95.

55 See Goredema C., "Variable standards of proof in disciplinary proceedings" (1996) 8 *Legal Forum* 20.

voluntary and substantiated admission of guilt by the student, (s)he is guilty."⁵⁶ In practice, the court is satisfied with proof on a balance of probabilities. The University of Zimbabwe, on the other hand, requires proof beyond reasonable doubt.⁵⁷ The university goes further than is required by the law as set out in *Mugabe and another v Law Society of Zimbabwe*,⁵⁸ quoted above, in so far as it draws no distinction between criminal and non-criminal misconduct. One can only speculate that this apparent "bending over backwards" is attributable to an abundance of caution. Most universities seem to uphold the principle that reasons must be given for the decisions of the disciplinary court within a reasonable time of the end of the hearing.

INTERNAL CONTROL OF THE DISCIPLINARY COURT

The most common method by which the disciplinary court is subjected to internal control is by allowing an aggrieved student to appeal to a sub-committee of Council. The University of Cape Town has a standing court of appeal which is chaired by a legal academic. The University of Natal (Durban) has a similar structure. The University of the Western Cape's appellate committee does not include a lawyer. The University of Venda's regulations also do not dictate a particular composition for the appellate committee of Council. At Wits, an Appeals and Review Committee made up entirely of legal professionals is appointed by Council to determine appeals. At the National University of Lesotho, appeals may go to either the Senate Review Committee on Discipline or the University Council depending on the severity of the penalty imposed. In contrast, at the University of the North West, appeals are directed to the Deputy Vice-Chancellor (Student Affairs). The University of Zimbabwe rules, like those in force at the University of Transkei, make no mention of an appellate structure. It appears that the disciplinary court's decision is finally determinative, internally at least. There is no appellate structure at Rhodes University either, but at that university, the Principal has powers of review over decisions of the Proctor or the Disciplinary Board.

In all cases the superior courts have review jurisdiction over all proceedings and decisions of disciplinary courts, committees and tribunals. Through the exercise of that jurisdiction the courts strive to give meaning and protect the procedural and other rights extended by administrative law.

CONCLUSION

It would be an oversimplification to describe any university in Southern Africa as a microcosm of the broader society in which it exists. Universities, especially residential ones, tend to constitute distinct societies in themselves. As such, they provide opportunities for socialization and the acquisition of life experience. It is to be hoped that in the process there is a development of an appreciation of the values which are essential to the co-existence of social beings. The structures within a university which are charged with the responsibility of maintaining discipline have an important role to play in developing this appreciation. They can only perform that role if they are committed to upholding a system which places a premium on those values. Administrative law offers such a system. Its value has long been recognized in the field of industrial relations in both the private and the public sectors

56 Rule 3.8.3.10.

57 Rule 8.6. So does the National University of Lesotho.

58 *Supra*, note 43.

of the economy. It is about time that universities embraced that law in a more systematic way. In fact, this is not a matter on which they have a choice. The courts have repeatedly demonstrated a readiness to interfere where administrative irregularities occur. It would not be inappropriate to conclude by urging that the old adage that prevention is better than cure be observed in letter and spirit.



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